NO. 43327-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

PILCHUCK CONTRACTORS, INC.

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES

Respondent.

Appeal from Superior Court of Pierce County

AMENDED BRIEF OF APPELLANT

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   Where the Respondent is charged with meeting all prima facie elements to establish a serious violation and where the Washington Industrial Safety and Health Act does not allow for strict liability, the lower Court erred in affirming the Respondent met its burden to prove Violation 1-2 and Violation 1-3 where the record supports otherwise.

2. Assignment of Error No. 2

   Assuming arguendo, where the Respondent relies on speculation to assert the Appellant did not effectively supervise, train or take steps to discover and correct employee violations and where the substantive record demonstrates contrary, the Respondent failed to establish the preclusion of the Appellant's affirmative defense of unpreventable employee misconduct resulting in the statutory basis for vacating Violation 1-2 and 1-3.

3. Assignment of Error No. 3

Assuming arguendo, where the Respondent can meet the prima facie elements as required and the lower Court erred in affirming calculation of penalties for Violation 1-1 and Violation 1-3 where the Respondent failed to recognize the presence of plates, pump jacks and a ladder when determining the numerical value of probability for the basis of the penalty calculations.

II. STATEMENT OF ISSUES

1. Issue Pertaining to Assignment of Error No. 1

Where the Respondent is charged with meeting all prima facie elements to establish a serious violation and where the Washington Industrial Safety and Health Act does not allow for strict liability, did the lower Court err in affirming the Respondent met its burden to prove Violation 1-2 and

Violation 1-3 where the record supports otherwise?

2. Issue Pertaining to Assignment of Error No. 2

   Assuming arguendo, where the Respondent relies on speculation to assert the Appellant did not effectively supervise, train or take steps to discover and correct employee violations and where the substantive record demonstrates contrary, has the Respondent failed to establish the preclusion of the Appellant's affirmative defense of unpreventable employee misconduct resulting in the statutory basis for vacating Violation 1-2 and 1-3?

3. Issue Pertaining to Assignment of Error No. 3

   Assuming arguendo, where the Respondent can meet the prima facie elements as required and did the lower Court err in affirming calculation of penalties for Violation 1-1 and Violation 1-3 where the Respondent failed to recognize the presence of plates, pump jacks and a ladder when

determining the numerical value of probability for the basis of the penalty calculations?

II. STATEMENT OF CASE

A. PROCEDURAL BACKGROUND

On July 6, 2009, the Department of Labor and Industries (hereinafter "Respondent") issued Citation and Notice No. 313224354 against the Appellant. (CABR p. 42-44).1 A timely appeal by the Appellant was made with the Department of Labor and Industries' Safety Division on July 9, 2009. As a result, the Respondent transferred the Appellant's appeal to the Board and a hearing was held on June 17, 2010, with subsequent perpetuation depositions scheduled thereafter.

A Proposed Decision and Order was signed by Industrial Appeal Judge Wakenshaw on September 23, 2010. (CABR p. 25- 38). A timely Petition for Review filed on behalf of the

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1 The Certified Appeal Board Record (CABR) is referenced in the Clerk's Papers. References throughout this brief will be contained in the CABR.

Appellant was filed on November 3, 2010. (CABR p. 12-20). On November 22, 2010 the Board issued an Order Denying Petition for Review and found the Proposed Decision and Order to become the Decision and Order of the Board. (CABR p. 1). The matter was thereafter heard on March 2, 2012, in the Superior Court in and for the County of Pierce wherein the Court affirmed the Board's Decision and Order. The Appellant now respectfully presents this matter before the Court of Appeals.

B. STATEMENT OF FACTS

On July 16, 2009, the Appellant was working on a project at the Chandler Street Railroad Track (hereinafter "worksite"). (Tr. 7/13/10, p. 5).2 The Department of Labor & Industries Safety and Health Compliance Officer Mr. John

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2 The Transcripts are referenced and supplemented to the Certified Appeals Board Record (CABR). Hereinafter transcripts will be referred to by date, page and relevant line number(s).

Korzenko (hereinafter "Mr. Korzenko"), was called to the worksite based upon an anonymous call alleging imminent danger. (Tr. 6/17/10, p. 13-14). Mr. Marv LaRue (hereinafter "Mr. LaRue") served as the general superintendent for the project and was not onsite during the inspection. (6/17/10, p. 57). The record reflects two Appellant employees were temporarily in the center portion of the trench to repair a broken conduit for a line. Photographs offered show three areas where the "fin" forms (trench boards) were set up. The Appellant's workers were located only in the center area where the wood splice was located. Mr. Jeff Heaton (hereinafter "Mr. Heaton") testified that the fin forms in that section had been cut from 8 feet to 6 feet. However, none of the employees were in the trench closest to the trackhoe.

In referencing the manufacturer's tabulated data, only one pump jack is required when the depth of the trench is 6 feet or less. Mr. Heaton testified that the 6 foot fin forms were above the ground level of the trench. For that reason, Mr.

Heaton testified that the spoils piles could not have possibly gone into the trench.

Despite failing to establish a hazard, exposure and employer knowledge, Mr. Korzenko completed his inspection and issued three serious citations against the Appellant:

1-1 WAC 296-155-655(3)(b) alleging the employer did not ensure that employees were protect by a safe means to access and egress an excavation.

1-2 WAC 295-155-655(10)(b) alleging the employer did not ensure protection of employees from excavated materials.

1-3 WAC 296-155-657(1)(a) alleging the employer did not assure excavation was adequately protected by cave-ins in that only one hydraulic cylinder was used.

The lower Court was correct in vacating Violation 1-1 along with the penalty which alleged the employer did not ensure that employees were protected by a safe means to access

and egress an excavation. (CABR p. 35, lines 2-7). The Appellant respectfully appeals before this Court for review of Violation 1-2, alleging the employer did not ensure protection of employees from excavated materials and Violation 1-3, alleging the employer did not assure excavation was adequately protected by cave-ins in that only one hydraulic cylinder was used.

III. ARGUMENT

A. Standard of Review

For WISHA cases, the standard of review is set forth in RCW 49.17.150(1). Findings of fact made by the Board are deemed conclusive if they are supported by substantial evidence in the record considered as a whole.

However, statutory interpretations for questions of law are reviewed by the appellate courts de novo. *Department of Labor & Industries v. Gongyin,* 154 Wn.2d 38, 44, 109 P.3d 816 (2005). An appellate court's prime construction objective is to "carry out the legislature's intent." *Department of Ecology*

v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). To discern legislative intent, courts will look to the statute as a whole. *The Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). Further, courts must harmonize statutes and rules to give effect to both. *State v. Ryan,* 103 Wn.2d 165, 178, 691 P.2d 197 (1984).

B. Where the Respondent is charged with meeting all prima facie elements to establish a serious violation and where the Washington Industrial Safety and Health Act does not allow for strict liability, the lower Court erred in affirming the Respondent met its burden to prove Violation 1-2 and Violation 1-3 where the record supports otherwise.

As set forth under RCW 49.17.180(6) and federal case law interpreting OSHA statutory requirements, the Department of Labor & Industries must establish that either the employer had actual knowledge of the alleged fall protection violation, or that it failed to meet its duty of care in exercising due diligence

in order to establish constructive knowledge of the violation. In relevant part, RCW 49.17.180(6) declares:

> (6) For the purposes of this section, a serious violation shall be deemed to exist in a work place if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in such work place, ***unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.*** (*Emphasis added*).

In interpreting WISHA regulations in the absence of state decisions, Washington courts look to the federal Occupational and Health Administration (OSHA) regulations and consistent federal decisions. *WA Cedar & Supply Co., Inc. v. State of WA Dept. of Labor & Industries*, 137 Wn. App. 592, 604 (2007). *Inland Foundry Co. v. State of WA Dept. of Labor & Industries,* 106 Wn. App. 333, 427 (2001).

The purpose and policy of the Occupational Safety and Health Act is "to assure so far as possible every working man and woman in the nation safe and healthful working

conditions..." 29 U.S.C. s 651. To achieve that goal, the Act imposes on employers a general duty to provide 'a place of employment . . . free from recognized hazards that are . . . likely to cause death or serious physical harm . . .,' and establishes a dual responsibility of employers and employees to 'comply with occupational safety and health standards." 29 U.S.C. s 654. *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568 3 O.S.H. Cas. (BNA) 2060, 1975-1976 O.S.H.D. (CCH) P 20,504 (5th Cir. 1976).

When drafting the Occupational Safety and Health Act "Congress quite clearly did not intend ... to impose strict liability: The duty was to be an achievable one.... Congress intended to require ***elimination only of preventable hazards***." (Emphasis added). *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568-69 (5th Cir.1976) (citing *Nat'l Realty & Construction Co. v. OSHRC*, 489 F.2d 1257 (D.C.Cir.1973)). Specifically, the "Act itself provides the basis for [this] reasoning [as] the statement of congressional purpose contained

in the Act evidences an intent to ensure worker safety ***only so far as possible***. (Emphasis added). *Penn. Power & Light Co. v. OSHRC*, 737 F.2d 350, 354 (3d Cir.1984) (citing *Brennan v. Occupational Safety and Health Review Com'n (Hanovia Lamp)*, 502 F.2d 946, 951-52 (3d Cir.1974)).

In referring to the employer and employee relationship, the Court in the case of *Mountain States Telephone and Telegraph Co. v. OSHRC* found "a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge actual or constructive of non-complying conduct of a subordinate." *Mountain States Telephone and Telegraph Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir.1980). However, the court emphasized that "when the noncomplying behavior is the supervisor's own a ***different*** situation is presented." (Emphasis added). *Id.*

The fifth circuit has held "a supervisor's knowledge of his own rogue conduct cannot be imputed to the employer; and

consequently ***the element of employer knowledge must be established, not vicariously through the violator's knowledge***, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor." (Emphasis added). *W.G. Yates & Sons Const. Co. Inc. v. OSHHRC*, 459 F.3d 604, 609 21 O.S.H. Cas. (BNA) 1609, 2005 O.S.H.D. (CCH) P 32,830 (5th Cir. 2006).

In the case of *W.G Yates & Sons.* a supervising employee was found working along a dangerous ledge without fall protection. *Id.* at 605. In finding the ALJ erred in imputing to company foreman's knowledge that, acting contrary to company's policy, his conduct violated the law the Court relied on the case of *Horne Plumbing & Heating Co. v. OSHRC* and stated "in this case it is not disputed that Olvera was a supervisory employee, that his own conduct is the OSHA violation, and that he knew his conduct was violative of the law

and of company policy. Yet, imputing to the employer the knowledge of a supervisor of his own violative conduct without any further inquiry would amount to the imposition of a strict liability standard, which the Act neither authorizes nor intends. *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568 (5th Cir.1976).

As discussed and relevant to the present case the Court in *W.G. Yates & Sons* sought to answer in what circumstances may it be appropriate to impute the knowledge of a supervisor to the employer. Unfortunately, there is not a clear consensus among the Circuit Courts, as disagreement in determining ***whether the government can establish an employer's knowledge of a violation of law based on a disobedient supervisor's misconduct***. See, e.g., *Danis-Shook Jt. Venture XXV v. Secretary of Labor*, 319 F.3d 805, 811-12 (6th Cir. 2003) (holding that the supervisor's knowledge of his own misconduct can be imputed to establish employer knowledge because such supervisor misconduct "raises an inference of lax

enforcement and/or communication of the employer's safety policy"); *Penn. Power & Light Co.*, 737 F.2d at 358-59 (Third Circuit holding that the Secretary cannot meet its burden to establish knowledge "where the inference of employer knowledge is raised only by proof of a supervisor's misconduct"); *Mountain States Telephone & Telegraph Co.*, 623 F.2d at 156 (Tenth Circuit holding that supervisor's knowledge and violation of the safety standard is insufficient evidence to establish employer knowledge, finding that a contrary rule would inappropriately "shift the burden of proof to the employer" on a required element of the violation). *W.G. Yates & Sons Const. Co. Inc. v. OSHHRC*, 459 F.3d 604, 608 21 O.S.H. Cas. (BNA) 1609, 2005 O.S.H.D. (CCH) P 32,830 (5th Cir. 2006).

Ultimately, the Court in *W.G. Yates & Sons* relied on *Horne*, to find "a supervisor's knowledge of his own malfeasance is not imputable to the employer where the employer's safety policy, training, and discipline are sufficient

to make the supervisor's conduct in violation of the policy ***unforeseeable***. (Emphasis added). *Id.* at 609. In the facts of *W.G. Yates & Sons*, Yates can be charged with knowledge only if Olvera's knowledge of his own misconduct is imputable to Yates. The knowledge is imputed only if Olvera's conduct was foreseeable. Consequently, the Secretary, not Yates, bears the burden to establish that the supervisor's violative conduct was foreseeable. *Id.*

"It is clear that the failure to comply with a specific regulation, even coupled with substantial danger is, standing alone, insufficient to establish a violation of the Act." See, e.g., *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 568-69 (5th Cir.1976) (citing *Nat'l Realty & Construction Co. v. OSHRC*, 489 F.2d 1257 (D.C.Cir.1973)); *Penn. Power & Light Co. v. OSHRC*, 737 F.2d 350, 354-55 (3rd Cir.1984) (citing *Brennan v. Occupational Safety and Health Review Com'n (Hanovia Lamp)*, 502 F.2d 946, 951-52 (3d Cir.1974)).

Proving employer knowledge is a strict obligation of the Department as part of its *prima facie* case. This obligation cannot be ignored or shifted away from the Department. In the present case, where the lower Court failed to recognize the Respondent failed to present evidence that spoil piles at issue were within two feet of the excavation at issue, as such Violation 1-2 must be vacated.

Specifically, the Appellant asserts the lower court failed to consider the record as a whole when concluding the following as such an opinion runs contrary to the substantial weight of the record presented, "Testimony was elicited by the employer to establish that the shoring sheets at the deepest part of the trench came above the top of the trench to hold the spoils back. *I don't think* this was sufficient to comply with the WAC section..." (Emphasis added); (CABR p. 35, p. 19-21). Such a statement refutes the established facts in the Proposed Decision and Order whereby the shoring sheets actually aided in the safety of the trench at issue and the Department's inspector

acknowledged spoil piles were two feet away from the edge of the trench. (CABR p. 29, lines 4-7). As an industry worker, Mr. Heaton testified as the IAJ acknowledged that the height of the shoring boards would actually stop any alleged piles from actually coming into the trench. (CABR p. 31, lines 20-22). The record reflects that the Respondent failed to present objective measurements of the spoil piles at issue yet made assumptions that the Employer's activities were in definite violation. (Tr. 6/17/10, p. 81-82).

In relevant testimony Mr. Heaton explained the difficulty in establishing spoil distance (6/17/10, p. 124, lines 14-23):

> Q. When you were putting up the spoils piles and allowing the workers to go into the trench, could you see how close the spoils piles were to the ends of the trench?
>
> A. I could yes. But if that picture shows, that Finn board goes all the way to the existing ground level, and then the spoil piles are back from there. So I believe that the load-bearing soil had been taken care of and the spoil piles were above and beyond

needing to be further away because of the height of the shore boards in the ditch.

The aforementioned clarification by Mr. Heaton establishes the "optical illusion" per se that was presented at the worksite on the day of inspection. Where the Respondent failed to take the time and care to provide applicable measurements of the height and distances at issue, lower Court erred in finding the Respondent establish hazard and exposure and Violation 1-2 must be vacated.

A thorough review of the record demonstrates the Appellant was in compliance with the manufacturer's instructions requiring only one hydraulic cylinder, as such Violation 1-3 must be vacated.

The Appellant respectfully asserts the IAJ erred when relying only on tabulated data requirements and failing to consider the impact of trench height in adjusting requirements. (CABR p. 35, lines 13-15). In referring to Exhibit 4 under section 5.6, the Department agreed with the statement that "an

excavation six feet deep or less only one hydraulic cylinder is required." (Tr. 6/17/10, p. 69-70).

There is no dispute that sheeting was used onsite, as referenced in the Proposed Decision and Order the Department's inspector also admitted "sheeting is used to prevent raveling or sloughing and that if that is not present you can simply use the hydraulic jacks alone. He admitted that *under six feet deep only one hydraulic jack* is required." (Emphasis added); (CABR p. 28, lines 26-29).

The record reflects extensive testimony regarding the data table requirements and whether they were followed. However, the prima facie burden rests upon the Department and in relevant testimony Mr. Korzenko, acknowledges a lack of exposure to a hazard (6/17/10, p. 67, lines 8-18):

> Q. So when they're working, they're between the two shore boards shown in photograph 3 where the shovel is, correct?
>
> A. Yes.

Q. And you never saw them work at any other portion of the entire excavation other than that area where the shovel is, correct?

A. No.

Q. And you don't see any kinds of tools or footprints further east of the ladder going towards the track hoe; aren't that true?

A. True.

Mr. LaRue was not present at the worksite during the inspection and as a working foreman and per case law cited, Mr. Heaton's knowledge is not automatically imputed to the Employer to full the Department's prima facie burden of knowledge.

Continued testimony by Mr. LaRue demonstrates the internal discipline policy of Pilchuck to reiterate the Employer's commitment to safety (7/13/10, p. 32, lines 5-19):

Q. And despite their belief that they had adequate shoring, you still believed or you will still cause Exhibit No. 11, the written warning to be issued?

A. That is correct.

Q. Even if they are right, would you have still issued the warning or not?

A. Yes, I would have.

Q. And tell us the reason why?

A. Well, because when I understand it – there's – I've been on L&I inspections before, and if there's a citation issued or believed to be issued, there's some gray there, and I take safety very serious. And if nothing else, it's just a written warning, its' a wake up crew – or awake up for this crew to make sure they are on their toes and they're doing a hundred and ten percent instead of a hundred.

The Appellant respectfully asserts the lower Court erred in relying upon the Employer's general knowledge of the trenching industry, rather than weighing the specific facts supported in the record, to establish the Employer had knowledge of alleged hazard in the violations involved in the present case. (CABR p. 35, lines 26-29). Employers are not held to a strict liability standard for WISHA violations. Where the Respondent has failed to establish the Appellant would have

knowledge of what actions to take when employees choose to expose themselves to a hazardous condition the violations must be vacated.

Mr. Korzenko acknowledged that in order for a citation to be issued the elements of hazard, exposure, code and employer knowledge must be established. (6/17/10, p. 56, lines 3-25). Based upon the foregoing, the Respondent has failed to establish the prima facie elements of hazard, exposure and knowledge and thus the citations must be vacated.

C. Assuming arguendo, where the Department can meet the prima facie elements as required, the IAJ erred when finding Violation 1-2 and Violation 1-3 should be affirmed where the Department failed to adequately show a defense of employee misconduct is inapplicable.

In relevant part RCW 49.17.120(5)(a) states the following:

> No citation may be issued under the section if there is unpreventable employee misconduct that led to the violation, but the employer must show the existence of:

(i) A thorough safety program, including work rules, training, and equipment designed to prevent the violation;
(ii) Adequate communication of these rules to employees;
(iii) Steps to discover and correct violations of its safety rules; and
(iv) Effective enforcement of its safety program as written in practice and not just in theory.

The Ninth Circuit's holding in *Brennan* has been adopted by the 3rd, 4th, 5th and 10th Circuit Courts of Appeal. In *Capital Electric Line Builders of Kansas, Inc. v. Marshall*, 678 F.2d 128 (10th Cir. 1982) the court held:

> There is little an employer can do to insure that the employee makes the proper judgment beyond providing adequate training and equipment, and explaining how to perform the job and what general hazards to avoid. *Id.* at 131.

Employers are not charged with monitoring each individual employee at all hours of the day to ensure compliance with the State's Safety and Health Act. Instead, where employers act with due diligence the employer cannot be liable for the personal subjective decisions of their employees.

In the case of *Secretary v. Southern Tea Company*, it is established that the statutes related to the enforcement of employee safety and health was not designed to protect against intentional or deliberate acts of employees. *Secretary v. Southern Tea Company*, OSHRC Dkt. No. 78-2321, Jan. 25, 1979.

The only means that may have possibly curbed this unpreventable employee misconduct would to have had constant supervision of its numerous employees. However, that is not feasible, nor is it the law:

- An employer is not required to provide constant surveillance by supervisors. *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940, 1999 CCH OSHD ¶ 31,932, p. 47,373 (No. 97-1676, 1999).

- *Secretary v. Packerland Packing Company of Texas, Inc.*, OSHRC Dkt. No. 13315, Nov. 17, 1977 ("The Act does not impose strict liability; an employer is only responsible for hazards it can prevent.")

In the case of *Legacy Roofing, Inc. v. Dept. of Labor & Industries*, the Court held an employer failed to establish the

unpreventable employee misconduct affirmative defense for employee failure to wear fall protection. *Legacy Roofing, Inc. v. Dept. of Labor & Industries*, 129 Wn. App. 356, 119 P.3d 366 (2005). However, in Legacy, the employer at issue had yet to satisfy its own inspection goals as outlined nor was it consistently penalizing employees who violated its safety policy. *Id.* at 372. In order for the employer to prove that the enforcement of its safety program is effective, it must prove that the employee's misconduct was not foreseeable. *Id.* at 367.

In the case of *Horne Plumbing & Heating Co. v. OSHRC,* the Court held that an employer who had done everything possible to insure compliance with the Act short of personally supervising operation himself could not be held liable for violations of Act committed by his experienced foremen who were aware of safety measures to be taken. *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 3 O.S.H. Cas. (BNA) 2060, 1975-1976 O.S.H.D. (CCH) P 20,504 (5th Cir. 1976). In *Horne*, the employer was found to be diligent in providing for

the safety of his employees, and there was no dispute that his foreman understood his policy and instructions. *Id.* at 567. It also appeared the employer had no reason to believe policy and instructions would be disregarded by his foreman. *Id.* In coming to its decision, the Court adopted the reasoning of the Ninth Circuit as "it was error to find Horne liable on an imputation theory for the unforeseeable, implausible, and therefore unpreventable acts of his employees. A contrary holding would not further the policies of the Act, and it would result in the imposition of a standard virtually indistinguishable from one of strict or absolute liability, which Congress, through section 17(k), specifically eschewed." *Id.* at 571.

In the leading case of *National Realty & Construction Co. v. OSHRC,* the Court held a "willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced safety regime. . . . Congress intended to require elimination only of preventable hazards." *National*

Realty & Construction Co. v. OSHRC, 160 U.S. App. D.C. 133, 489 F.2d 1257 (1973).

The Seventh Circuit agreed with the D.C. Circuit's construction, and held that an employer was not guilty of a serious violation of the general duty clause when an inexperienced employee was killed while unloading a truck, after the employer had explicitly warned him to stay away from the trucks. *Brennan v. OSHRC*, 501 F.2d 1196 (7th Cir. 1974). The issue, the court determined, was foreseeability and concluded that a reasonably diligent employer could not have foreseen the danger. The Seventh Circuit elaborated on the foreseeability requirement of section 17(k): 'In sum, whether a serious violation of the standard was foreseeable with the exercise of reasonable diligence depends in great part on whether (the) employees . . . had received adequate safety instructions.' *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1018 (7th Cir. 1975) (specific duty case).

The Department of Labor and Industries cited Washington Cedar and Supply for failing to ensure that its employees were wearing fall restraints when they delivered materials onto the roof of a construction site in the case of *WA Cedar & Supply Co., Inc. v. Dept. of Labor & Industries*, 119 Wn. App. 906, 83 P.3d 1012, 20 O.S.H. Cas. (BNA) 1489 (2003). In asserting the defense of unpreventable employee misconduct, the employer in *WA Cedar* took issue with RCW 49.17.120(5) as allowing the unpreventable employee misconduct defense only where the violation is characterized as an "isolated occurrence." But the Board's interpretation of RCW 49.17.120(5) was not this narrow. *Id.* at 912. In an effort to clarify, the Court stated: The "isolated occurrence" language stems from agency and judicial interpretation of the "effective enforcement" prong of the unpreventable employee misconduct defense. RCW 49.17.120(5)(iv). The Board and federal courts have concluded that in order for the enforcement of a safety program to be "effective," the misconduct could not have been

foreseeable. *Jeld-Wen*, No. 88 W144; *Brock*, 818 F.2d at 1277 (stating that the violation must have been "idiosyncratic and unforeseeable"); *Austin Bldg. Co. v. Occupational Safety & Health Review Comm'n*, 647 F.2d 1063, 1068 (10th Cir.1981); *Mineral Indus. & Heavy Constr. Group v. Occupational Safety & Health Review Comm'n*, 639 F.2d 1289, 1293 (5th Cir.1981). In *WA Cedar*, the Court found "repeat citations for the same safety violation should put an employer on notice that it is not effectively enforcing its safety program. Thus, absent changes in the safety program or increased enforcement measures, the employer should anticipate continued violations." *Id.*

The case of *In re: Wilder Construction Co.* is referenced by the Appellant to address employer noncompliance with training standards. *In re: Wilder Construction Co.,* 2007 WL 3054874 (Wash. Bd. Ind. Ins. App.). Interestingly, *Wilder* cites the case of *Trinity Industries, Inc.*, Where the Commission found "the Secretary had ***failed*** to establish a training violation because the employer was able to establish that it trained

employees about the combustibility and fire hazard of a coating compound (Tectyl) and the employer had specifically trained employees to not enter tanks until a hot work permit was issued; use a fire watch when welding; wear all-cotton clothing; ventilate tanks; and remove preservative coatings from the point of welding. The Secretary was not able to persuasively demonstrate ***how*** the established training was deficient. (Emphasis added). *Trinity Industries, Inc.*, OSHRC Docket No. 95-1597; 20 OSHC (BNA) 1051 (April 26, 2003). In *Wilder*, it was found there was "no evidence from Wilder about what training, if any, they provided." *In re: Wilder Construction Co.,* 2007 WL 3054874 (Wash. Bd. Ind. Ins. App.).

In the case of *New York State Electric & Gas Corporation v. Secretary of Labor and OSHRC*, the employer appealed two citations issued for its alleged failure to comply with safety standards where the Commission "declined to follow cases from the Third and Tenth Circuits placing the burden of proof for employee misconduct on the Secretary.

Again, it stated that whether or not Webb was a supervisor was not relevant: in either case, the employer had failed to make sufficient efforts to detect violations of the safety rules. Were Webb not a supervisor, but simply Price's co-worker, then supervision was inadequate because it was limited to brief, twice-daily visits to work sites; if Webb was a supervisor, then NYSEG failed to show it did enough to prevent safety violations, including adequate training of its supervisors." *New York State Electric & Gas Corporation v. Secretary of Labor and OSHRC*, 88 F.3d 98, 35 Fed.R.Serv.3d 454, 17 O.S.H. Cas. (BNA) 1650, 1995-1997 O.S.H.D. (CCH) P 31,099 (2d Cir.). In *New York*, the Court found the Commission did not seriously analyze both parties advanced reasons for reaching opposite conclusions regarding the adequacy of NYSEG's safety program. But to accept the Secretary's position would be to "accept appellate counsel's post hoc rationalizations for agency action." *Id.* See also *Metropolitan Life*, 380 U.S. at 444, 85 S. Ct. at 1064-65.

There is a lack of consensus among the Circuit Courts regarding the defense of unpreventable employee misconduct as discussed in the case of *New York. Id.* The fourth circuit has held "the Secretary has the burden to show an employee's act was not idiosyncratic and unforeseeable, rejecting the Commission's position that unpreventability is an affirmative defense to be established by the employer." See *Ocean Electric Corp. v. Secretary of Labor,* 594 F.2d 396, 401-02 (4th Cir.1979); *Forging Indus. Ass'n v. Secretary of Labor*, 773 F.2d 1436, 1450 (4th Cir.1985) (referring to "unforeseeable employee misconduct" as a "defense" available to the employer under the Act). Two Circuits have held that the Secretary must disprove "unpreventable conduct" in the special situation where the alleged violative conduct is that of a supervisor. *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 358 (3d Cir.1984); *Mountain States Tel. and Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir.1980).

The majority of the Circuits have held that unpreventable employee misconduct is an affirmative defense that an employer must plead and prove. The First Circuit so held in a case involving the general duty clause, *General Dynamics Corp. v. OSHRC*, 599 F.2d 453, 459 (1st Cir.1979), as have the Fifth, Sixth, Eighth, and Eleventh Circuits in special duty cases, *H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 818 (5th Cir. Unit A Mar.1981); *L.E. Myers*, 818 F.2d at 1277; *Danco Constr. Co. v. OSHRC*, 586 F.2d 1243, 1246-47 (8th Cir.1978); *Daniel Int'l Corp. v. OSHRC*, 683 F.2d 361, 364 (11th Cir.1982).

Contrary to the Secretary's suggestion, the view of the majority of the Circuits-that unpreventable misconduct is an affirmative defense-does not compel a holding that the employer bears the burden on the adequacy of its safety policy in this case. The Secretary must first make out a prima facie case before the affirmative defense comes into play. See *L.E. Myers*, 818 F.2d at 1277.

1. **Assuming arguendo, where the Respondent relies on speculation to assert the Appellant did not effectively supervise, train or take steps to discover and correct employee violations and where the substantive record demonstrates contrary, the Respondent has failed to establish the preclusion of the Appellant's affirmative defense of unpreventable employee misconduct resulting in the statutory basis for vacating Violation 1-2 and 1-3.**

Where the employee at issue was fully aware of the Employer's practices and procedures yet affirmatively chose to ignore them with subjective and unauthorized discretion, violations at issue must be vacated under the affirmative defense of employee misconduct. In the present case, not only were rules communicated but the record clearly demonstrates that employees knew and recognized the safety standards required.

As per the Proposed Decision and Order, the IAJ took issue with 1) whether the disciplinary system was clear to the workers and 2) whether the Petitioner utilized a sufficient safety

check system. (CABR p. 36, lines 1-5). Simply, as referenced in RCW 49.17.120(5)(a)(i) and (ii), the employer is required to adequately communicate a thorough *safety program, including work rules, training, and equipment* designed to prevent the violation." (RCW 49.17.120(5)(i) & (ii). At no point in the WAC is there a requirement that disciplinary policies be clear to workers.

In regard to the Appellant's efforts in discovering violations, the record is clear that Mr. Heaton was a well-trained equipment foreman and operator. (Tr. 6/17/10, p. 97-98). Prior to June 16, 2009, Mr. Heaton had never been disciplined for trenching or excavation violations. (6/17/10, p. 128). In fact, Mr. LaRue testified that Mr. Heaton had always been a "top hand" that could be counted on to keep workers safe. (7/13/10, p. 13). Therefore, there was simply no steps that could have been taken to "discover" or "check" for any alleged actions that could be deemed to support the violations at issue.

The Appellant provided a thorough safety program which included an accident prevention program. (6/17/10, p. 70). In fact, the Respondent's inspector, Mr. Korzenko acknowledged the Employer conducted safety orientations including ones specifically for trenching and weekly safety inspections. (6/17/10, p. 71).

Mr. Ron Martinez (hereinafter "Mr. Martinez" served as the Safety Director for the Appellant during the inspection period at issue. In relevant testimony Mr. Martinez went into detail regarding the specific training of employees and the emphases on trenching and excavations since the Employer is primarily an underground utility contractor. (6/17/10, p. 133-135). Despite extensive training and on the job experience, Mr. Heaton testified that he had data on site and but *chose not to refer to it but instead relied upon his gut instincts* which were contrary to the Employer's direction. (Emphasis added). (6/17/10, p. 103).

The Appellant has always strived to hire and continually train only qualified and competent operators. Such effort is demonstrated by Mr. Martinez's testimony regarding the Employer's training program and Mr. LaRue's stringent perspective on discipline. Mr. Heaton's work had always been valued and continually monitored with no reason for concern before the June 16th, 2009, incident.

Assuming arguendo, where this Court finds that the Respondent can establish the prima facie elements required to sustain the violations, the Court must also find that the IAJ erred in failing to find the Appellant met all the requirements to support a finding of the affirmative defense of unpreventable employee misconduct whereby a decision reflecting vacating of all remaining violations must be issued.

D. Assuming arguendo, where the Respondent can meet the prima facie elements as required, the lower Court erred in affirming calculation of penalties for Violation 1-1 and Violation 1-3 where the Respondent failed to recognize the presence of plates, pump jacks and a ladder when determining the numerical value of

probability for the basis of the penalty calculations.

The Appellant respectfully asserts that the lower Court erred in affirming the Respondent's "low medium" probability calculation where the record reflects the Board of Industrial Insurance Appeals IAJ failed to take into account the impact of the Appellant's actions for prevention and safety. (CABR p. 27, lines 26-30).

Under WAC 296-900-14005, the Washington Industrial Safety and Health Act (hereinafter "WISHA") will assess monetary penalties "when a citation and notice is issued for a serious, willful, or egregious violation." (WAC 296-900-14005). WISHA calculates the base penalty by deferring to a specific amount dictated by statute or by utilizing the more common gravity method. (WAC 296-900-14010). The gravity or "weight" of the violation is established by multiplying severity by probability. *Id.* Severity rates are expressed in whole numbers ranging from the lowest "one" to the highest

"six." Rates under severity are based on the most serious injury, illness or disease that could be reasonably expected to occur due to a hazardous condition. *Id.* At issue is the probability rate that unlike the severity rate reflects "the *likelihood* of any injury, illness, or disease occurring." *Id.* (Emphasis added). Similarly to the severity rating scale, the probability scale is also based upon a whole number system ranging from the lowest "one" to the highest "six." When determining probability, the following factors are considered: 1) frequency and amount of exposure, 2) number of employees exposed, 3) instances or numbers of times the hazards is identified in the workplace and 4) how close an employee is to the hazard, 5) weather and other working conditions, 6) employee skill level and training, 7) employee awareness of hazard, 8) pace, speed and nature of the task or work, 9) use of personal protective equipment and 10) other mitigating or contributing circumstances. *Id.*

In the present case, the probability rating of "3" for

Violation 1-2 and Violation 1-3 is not supported by the substantial record as a whole. Specifically, probability of a cave-in was greatly reduced as there were plates and pump jacks in place, even if assuming arguendo, not as many as required by the manufacturer. Furthermore, a ladder was close by and egress ramps were located within 25 feet for exit.

The record also reflects that the probability score of "three" for all citations at issue were based on alleged employee exposure of five minutes. (Tr. 6/17/10, p. 76). However, even after acknowledging the following, the Department inspector still failed to lower the assignment of probability based upon their own standards: 1) workers allegedly involved were trained journey-level workers, 2) the Employer had communicated their tailored safety program to workers via safety orientations, 3) there was a competent person onsite and 4) shoring was in place on Chandler Street. (6/17/10, p. 77-80).

Where the Respondent can meet the prima facie elements as required, the IAJ erred in finding penalties for Violation 1-1

and Violation 1-3 should be affirmed where the Respondent failed to recognize presence of plates, pump jacks and a ladder when determining probability for the basis of the penalty calculations.

IV. CONCLUSION

The Respondent is charged by statute to assure a safe and healthful working environment, not to punish employers based on technicalities. Based upon the foregoing, where the Respondent has failed to meet the prima facie elements required the lower Court erred and the violations at issue must be vacated. In the alternative, where this Court upholds the violations the Appellant respectfully requests a penalty reduction based upon the incorrect probability calculations.

DATED this 28th day of June, 2012.

Aaron K. Owada

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Attorney for Appellant

CERTIFICATE OF SERVICE

I, Lisa Ockerman, hereby certify under penalty of perjury under the laws of the State of Washington that on June 28, 2012, I filed with the Court of Appeals Division Two, via U.S. Mail, the original and one copy of the following document:

1. AMENDED **BRIEF OF APPELLANT**

and that I further served a copy via U.S. mail upon:

Sean M. Davis, AAG
Office of the Attorney General
Labor & Industries Division
PO Box 40121
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SIGNED in Lacey, Washington on June 28, 2012.

Lisa Ockerman

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